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7 **UNITED STATES DISTRICT COURT**
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9 **EASTERN DISTRICT OF CALIFORNIA**

10 ASCENCION GOMEZ,

11 Petitioner,

12 v.

13 BRIAN CATES,

14 Respondent.

Case No. 1:23-cv-01001-EPG-HC

FINDINGS AND RECOMMENDATION TO
DISMISS PETITION FOR WRIT OF
HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE

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16 Petitioner Ascencion Gomez is a state prisoner proceeding *pro se* with a petition for writ
17 of habeas corpus pursuant to 28 U.S.C. § 2254. Given that the instant petition is not cognizable
18 in federal habeas corpus, the undersigned recommends that the petition be dismissed without
19 prejudice to refiling the claims in a properly filed civil action brought pursuant to 42 U.S.C.
20 § 1983.

21 **I.**

22 **BACKGROUND**

23 In 1997, Petitioner was convicted in the San Bernardino County Superior Court of first-
24 degree murder with use of a firearm and attempted murder with use of a firearm and sentenced to
25 an imprisonment term of fifty-two years to life. (ECF No. 1 at 1.)¹ On July 5, 2023, Petitioner
26 filed the instant petition for writ of habeas corpus wherein Petitioner challenges the Board of
27 Parole Hearings' denial of parole. (*Id.* at 5.) Petitioner asserts that the Board arbitrarily denied

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 him parole, in violation of the Fourteenth Amendment, and did not give him a meaningful
2 opportunity to obtain release, in violation of the Eighth Amendment. (ECF No. 1 at 5, 11.)

3 **II.**

4 **DISCUSSION**

5 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
6 habeas petition and allows a district court to dismiss a petition before the respondent is ordered
7 to file a response, if it “plainly appears from the petition and any attached exhibits that the
8 petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing Section 2254
9 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

10 **A. Federal Habeas Corpus Jurisdiction**

11 By statute, federal courts “shall entertain an application for a writ of habeas corpus in
12 behalf of a person in custody pursuant to the judgment of a State court only on the ground that he
13 is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
14 § 2254(a). A claim falls within the “core of habeas corpus” when a prisoner challenges “the fact
15 or duration of his confinement” and “seeks either immediate release from that confinement or the
16 shortening of its duration.” Preiser v. Rodriguez, 411 U.S. 475, 489 (1973). The Ninth Circuit
17 has adopted the rule that a “state prisoner’s claim [that] does not lie at ‘the core of habeas
18 corpus’ . . . must be brought, ‘if at all,’ under § 1983.” Nettles v. Grounds, 830 F.3d 922, 934
19 (9th Cir. 2016) (en banc) (quoting Preiser, 411 U.S. at 487; Skinner v. Switzer, 562 U.S. 521,
20 535 n.13 (2011)). Therefore, if “success on [Petitioner]’s claims would not necessarily lead to his
21 immediate or earlier release from confinement, [Petitioner]’s claim does not fall within ‘the core
22 of habeas corpus,’ and he must instead bring his claim under § 1983.” Nettles, 830 F.3d at 935
23 (quoting Skinner, 562 U.S. at 535 n.13).

24 In the petition, Petitioner challenges the Board of Parole Hearings’ denial of parole,
25 arguing that the Board arbitrarily denied parole and did not give him a meaningful opportunity to
26 obtain release, in violation of the Fourteenth and Eighth Amendments. (ECF No. 1 at 5, 11.) The
27 Court finds that success on Petitioner’s claims would not necessarily lead to a grant of parole,
28 but rather a new parole hearing. See Richardson v. Bd. of Prison Hearings, 785 F. App’x 433,

1 434 (9th Cir. 2019) (holding that petition asserting Eighth and Fourteenth Amendment violations
2 arising from denial of request for early parole would not necessarily result in immediate release
3 from prison but rather entitlement to a new parole hearing). Under California law, the parole
4 board must consider all relevant reliable information in determining suitability for parole and has
5 the authority to deny parole on the basis of any grounds presently available to it. Nettles, 830
6 F.3d at 935. As success on Petitioner’s claims would not necessarily lead to his immediate or
7 earlier release from confinement, these claims do not fall within “the core of habeas corpus,” and
8 thus, are not cognizable in federal habeas corpus. See Nettles, 830 F.3d at 935. Accordingly,
9 Petitioner has failed to state cognizable claims for federal habeas corpus relief with respect to his
10 claims challenging the denial of parole, and dismissal is warranted on this ground.

11 **B. Conversion to § 1983 Civil Rights Action**

12 “If the complaint is amenable to conversion on its face, meaning that it names the correct
13 defendants and seeks the correct relief, the court may recharacterize the petition so long as it
14 warns the *pro se* litigant of the consequences of the conversion and provides an opportunity for
15 the litigant to withdraw or amend his or her complaint.” Nettles, 830 F.3d at 936 (quoting Glaus
16 v. Anderson, 408 F.3d 382, 388 (7th Cir. 2005)). The Court notes that habeas corpus and
17 prisoner civil rights actions differ in a variety of respects, such as the proper defendants, filing
18 fees, exhaustion requirements, and restrictions on future filings (e.g., the Prison Litigation
19 Reform Act’s three-strikes rule). Nettles, 830 F.3d at 936 (citing Robinson v. Sherrod, 631 F.3d
20 839, 841 (7th Cir. 2011); Glaus, 408 F.3d at 388).

21 Due to these differences and the disadvantages that recharacterization may have on
22 Petitioner’s claims, the undersigned finds that it would be inappropriate to construe the habeas
23 petition as a civil rights complaint under 42 U.S.C. § 1983. The Court notes that the filing fee for
24 § 1983 civil rights cases is \$350, and Petitioner is required to pay the full amount by way of
25 deductions from income to Petitioner’s trust account, even if granted *in forma pauperis* status.
26 See 28 U.S.C. § 1915(b)(1). Moreover, the petition names Brian Cates, the warden at the
27 California Correctional Institution, as Respondent and thus, does not name the correct defendant
28 in a civil rights action challenging the Board of Parole Hearings’ denial of parole. See Ashcroft

1 v. Iqbal, 556 U.S. 662, 676 (2009) (“[A] plaintiff must plead that each Government-official
2 defendant, through the official’s own individual actions, has violated the Constitution.”). This
3 conclusion, however, does not preclude Petitioner from pursuing his claims in a properly filed
4 civil action brought pursuant to 42 U.S.C. § 1983.

5 **III.**

6 **RECOMMENDATION & ORDER**

7 Accordingly, the undersigned HEREBY RECOMMENDS that the petition for writ of
8 habeas corpus be DISMISSED without prejudice to refiling the claims in a properly filed civil
9 action brought pursuant to 42 U.S.C. § 1983.

10 Further, the Clerk of Court is DIRECTED to randomly assign a District Court Judge to
11 the present matter.

12 This Findings and Recommendation is submitted to the assigned United States District
13 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
14 Rules of Practice for the United States District Court, Eastern District of California. Within
15 **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may file
16 written objections with the court and serve a copy on all parties. Such a document should be
17 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” The assigned
18 United States District Court Judge will then review the Magistrate Judge’s ruling pursuant to 28
19 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified
20 time may waive the right to appeal the District Court’s order. Wilkerson v. Wheeler, 772 F.3d
21 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).
22 IT IS SO ORDERED.

23 Dated: August 2, 2023

24 /s/ *Eric P. Groj*
25 UNITED STATES MAGISTRATE JUDGE
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